RECENT DEVELOPMENT

International Union v. Dana Corp.[*]

I. INTRODUCTION

Courts have developed an arsenal of theories to ensure that settled claims and issues remain conclusively resolved.[1] Such theories include: res judicata, stare decisis, and collateral estoppel. The American system of courts is set up to provide for the just resolution of disputes.[2] Arbitration also provides for the just resolution of disputes, and in a study undertaken by the Bureau of National Affairs, ninety-nine percent of all collective bargaining agreements were found to have provisions requiring arbitration of disputes.[3] In *International Union v. Dana Corp.*,[4] Dana Corporation ("Dana") attempted to convince the Sixth Circuit that the abovementioned theories should apply to arbitrations arising out of their collective bargaining agreement with the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW").[5]

In *Dana Corp.*, the Sixth Circuit rejected Dana's argument and left the question of precedential effect to the arbitrator.[6] The court would not provide Dana relief from the unambiguous language of its written agreement with the UAW.[7] This case represents the struggle between the important value of finality[8] and the contractual nature of arbitration.[9] In the end, though, the contractual nature of arbitration reigns supreme. The Supreme Court has continually restated the expansive degree of deference that arbitrators are given.[10] The application of precedential effect to a prior arbitration belongs

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[*] Int'l Union v. Dana Corp., 278 F.3d 548 (6th Cir. 2002).

[1] Timothy J. Heinsz, *Grieve it Again: Of Stare Decisis, Res Judicata and Collateral Estoppel in Labor Arbitration*, 38 B.C. L. REV. 275, 275 (1997).

[2] *Id.*

[3] BUREAU OF NAT'L AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 37 (14th ed. 1995).

[4] *Dana Corp.*, 278 F.3d at 555.

[5] *See id.*

[6] *Id.* at 557.

[7] *Id.* at 557–58.

[8] Heinsz, *supra* note 1.

[9] *See infra* text accompanying note 90.

[10] *See infra* text accompanying notes 43, 87–88.

in the hands of the arbitrator, and the Sixth Circuit acknowledged this and decided *Dana Corp.* correctly.[11]

II. FACTS AND PROCEDURAL HISTORY

The UAW and Dana were parties to a collective bargaining agreement ("Master Agreement") that covered several of Dana's plants.[12] The Master Agreement, most recently renegotiated in 1998,[13] contained provisions regarding the arbitration of grievances, and the selection of a permanent arbitrator ("Arbitrator") by agreement.[14] Further, the Agreement stated that all decisions of the Arbitrator "shall be final and binding upon both the Union and the Company."[15] Dana's behavior at its unorganized plants when the UAW sought to represent the employees was governed by a side letter ("Neutrality Letter") to the Master Agreement.[16] In the Neutrality Letter, Dana and the UAW agreed to a provision that required all disputes involving neutrality to be submitted to final and binding arbitration.[17]

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[11] *See infra* text accompanying notes 62–65.

[12] Int'l Union v. Dana Corp., 278 F.3d 548, 550–51 (6th Cir. 2002).

[13] *Id.* at 551 n.1.

[14] *Id.* at 551. The Master Agreement governed how the arbitrator was to make decisions and provided:

> In deciding a case, it shall be the function of the Arbitrator to interpret the Agreement and all Supplemental Agreements thereto and to decide whether or not there has been a violation thereof. He shall have no right to change, add to, subtract from, or modify any of the terms of this Agreement or any Supplemental Agreements thereto . . . .

Id.

[15] *Id.*

[16] *Id.* The letter provides:

> Where the UAW becomes involved in matters relating to the representation of our employees, we intend to continue our commitment of maintaining a neutral position on this matter. The Company and/or its representatives will communicate with our employees, not in an anti-UAW manner, but in a positive pro-Dana manner.

Id. Dana stated that it had no objections to the UAW becoming or remaining the bargaining representative as a result of an election. *Id.* However, Dana reserved the right to "speak out in any manner appropriate when undue provocation is evident in a representation campaign." *Id.*

[17] *Id.* at 551 n.3. The parties would not resort to legal action unless one party did not abide by the Arbitrator's decision and the Arbitrator concluded as such. *Id.*

Permanent Arbitrator Richard Mittenthal interpreted the neutrality letter in arbitration awards in 1981, 1994, and two in 1997.[18] In his opinion for the 1981 arbitration, he recognized that Dana and the UAW had not agreed to a stance of "strict neutrality," whereby Dana would have been prohibited from taking any stance with respect to union organization.[19] Rather, Arbitrator Mittenthal found that the parties had agreed that Dana's opposition, if any, to a UAW organizing campaign could not be couched in anti-UAW language.[20] He recognized that "at first blush" there appears to be a possible contradiction and explained that "what the parties appear to have in mind is that Dana argue its case in an objective high-minded fashion without . . . threats and innuendos."[21] In Arbitrator Mittenthal's 1994 arbitration opinion, he expanded on what he meant by "anti-UAW" by stating that it shall mean "*any* anti-UAW statements—truthful or untruthful."[22] In the 1997 arbitrations, Arbitrator Mittenthal reiterated his 1981 and 1994 interpretations of the neutrality provision.[23]

The UAW attempted to organize the Dana Plant in Greensboro, North Carolina in 1998, and on September 4, 1998, the UAW filed a grievance with Paul E. Glendon, the new permanent arbitrator.[24] Arbitrator Glendon, in his arbitration opinion, discussed the history of the neutrality provision and recognized that Arbitrator Mittenthal's interpretation "had been a part of the parties' collective bargaining relationship for seventeen years" and that "questions of whether the Corporation violated the Neutrality Letter at Greensboro . . . must be answered with this arbitral history in mind."[25] The interpretation of the neutrality provision by Arbitrator Mittenthal was expressly invoked for three out of the five charges that Arbitrator Glendon had sustained.[26]

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[18] *Id.* at 551.

[19] *Id.* at 551–52.

[20] *Id.* at 552.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* The UAW charged Dana with twelve violations of the neutrality letter. *Id.* Arbitrator Glendon ultimately issued an award for the UAW on five of the charges. *Id.*

[25] *Id.* (quoting Joint Appendix (hereinafter "J.A.") at 149 (1999 Arbitration)).

[26] *Id.* The first charge involved a communication of Dana where it had linked union representation with job loss, and Arbitrator Mittenthal had stated in his 1997 arbitration opinion that such a linkage was anti-UAW and "can hardly be viewed as a communication . . . in a positive pro-Dana manner." *Id.* at 552–53 (quoting J.A. at 151 (1999 Arbitration) (quoting Feb. 13, 1997 arbitration, J.A. at 127) (alteration in original)).

Arbitrator Glendon rejected Arbitrator Mittenthal's interpretation for the sixth and twelfth charges.[27] The sixth charge involved a letter sent by a plant manager to the Dana employees stating that Dana was absolutely opposed to unionization at the plant and described the negative results for employees.[28] Arbitrator Glendon recognized that the letter was not explicitly anti-UAW, and it might have even passed muster under Arbitrator Mittenthal's interpretation.[29] However, he stated that "it is not only difficult, but impossible, to reconcile such statements with the 'no objection' pledge in particular and the commitment of neutrality in general."[30] Similar to Arbitrator Mittenthal, Arbitrator Glendon stated that:

> [Dana was] not sentenced to silence in a UAW organizing campaign, but what the Neutrality Letter permits by way of pro-Dana communication is, at most, a statement by management to employees at a plant facing an organizational campaign that Dana has no objection to the UAW representing them but wishes to remind them of the benefits they already enjoy without such representation.[31]

With respect to the twelfth charge, Arbitrator Glendon found Dana violated the Neutrality Letter in its "strident" opposition to the UAW representational campaign which "effected the constructive discharge of employee Crystal Windsor."[32]

The UAW filed a claim in the United States District Court for the Northern District of Ohio pursuant to the Labor Management Relations Act[33]

The second and third charges were sustained because Dana had made explicit anti-UAW statements to its employees. *Id.* at 553.

[27] *Id.*

[28] *Id.* The letter used scare tactics such as "unions . . . want to lock companies up into restrictive contracts" and "[unionization] will be like giving others a blank check to make decisions about your future." *Id.* at 553 n.4.

[29] *Id.* at 553; *supra* text accompanying notes 19–23.

[30] *Id.*

[31] *Id.*

[32] *Id.* Arbitrator Glendon never explained which interpretation of the neutrality provision he used on the twelfth charge, his or Arbitrator Mittenthal's interpretation. *Id.* As the Sixth Circuit explained, "[I]t is possible that Arbitrator Mittenthal would not have come to the same conclusion." *Id.*

[33] 29 U.S.C. § 185(a) (2000). The National Labor Relations Act ("NLRA") is located at 29 U.S.C. §§ 151–69 (2000). The NLRA was originally enacted in 1935 and is referred to as the Wagner Act. The most important amendments are the Labor-Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 141–87 (2000), and the

to enforce Arbitrator Glendon's award.[34] Dana responded by filing a counterclaim to vacate the award, and the cases were consolidated in the district court.[35] The UAW moved for summary judgment, and then Dana filed a cross motion for summary judgment, whereby Dana argued that because "Arbitrator Glendon's interpretation of the neutrality provision diverged from Arbitrator Mittenthal's interpretation of the provision, Arbitrator Glendon's interpretation of the provision failed to draw its essence from the collective bargaining agreement and violated public policy."[36]

The district court concluded that prior arbitration opinions do not bind later arbitrations unless the collective bargaining agreement so states.[37] Moreover, the court found that Arbitrator Glendon's interpretation of the neutrality letter "drew its essence from the collective bargaining agreement."[38] The UAW's motion for summary judgment was granted and Dana's cross motion was denied—whereby Dana appealed.[39] The judge from the district court stated that "[a]lthough the issue is not entirely resolved in the case law, I conclude that the best approach is to refrain, as a general rule, from requiring an arbitrator to give res judicata, collateral estoppel, or other preclusive effect to decisions in earlier arbitrations."[40]

III. SIXTH CIRCUIT'S HOLDING

The Sixth Circuit stated that the scope of review of a district court's grant of summary judgment in an arbitrated labor dispute is "extremely limited."[41] The United States Supreme Court described this scope of review by stating: "As long as the arbitrator's award draws its essence from the collective bargaining agreement, and is not merely his own brand of industrial justice, the award is legitimate."[42] An arbitrator need only be

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Labor-Management Reporting and Disclosure (Landrum-Griffen) Act of 1959 (codified as amended in sections throughout 29 U.S.C.).

[34] *Dana Corp.*, 278 F.3d at 553.

[35] *Id.*

[36] *Id.* at 553–54.

[37] *Id.* at 554.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 555 (citing Order Granting Plaintiff's Motion for Summary Judgment).

[41] *Id.* at 554 (citing Beacon Journal Publ'g Co. v. Akron Newspaper Guild, Local No. 7, 114 F.3d 596, 599 (6th Cir. 1997)).

[42] *Id.* (citing United Paperworkers Int'l Union v. Misco, 484 U.S. 29, 36 (1987) (quotation marks omitted)); United Steelworkers of Am. v. Enterprise Wheel and Car

"arguably construing or applying the contract and acting within the scope of his authority" for a court to sustain the arbitrator's decision, even though the court may be "convinced he committed serious error."[43] Accordingly, the Sixth Circuit has developed a four-prong test for determining when an arbitration award fails to draw its essence from the collective bargaining agreement.[44] An arbitration award fails when:

> (1) [I]t conflicts with express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement; or (4) it is based on general considerations of fairness and equity instead of the exact terms of the agreement.[45]

The Sixth Circuit concluded that it was within the scope of Arbitrator Glendon's authority to diverge from Arbitrator Mittenthal's interpretation of the neutrality provision and held that the award drew its essence from the Master Agreement.[46] Further, the court rejected Dana's argument that Arbitrator Glendon's interpretation violates federal labor policy.[47]

IV. DISCUSSION

A. *Preclusive Effect of Prior Arbitrations*

The court acknowledged that there are three ways to treat prior arbitrations.[48] The Eighth Circuit stated that "the doctrine of res judicata may apply to arbitrations with strict factual identities."[49] A second way to treat prior arbitration decisions is the Fifth Circuit's "material factual identity test

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Corp., 363 U.S. 593, 597 (1960) (holding an "award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award").

[43] *Dana Corp.*, 278 F.3d at 554 (citing Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001) (quotation marks omitted in original)).

[44] *Id.*

[45] *Id.* (citing MidMichigan Reg'l Med. Ctr.-Clare v. Prof'l Employees Div., of Local 79, 183 F.3d 497, 502 (6th Cir. 1999) (quotation marks omitted in original)).

[46] *Id.* at 557–58.

[47] *Id.* at 558.

[48] *Id.* at 554–58.

[49] *Id.* at 555 (citing Trailways Lines Inc. v. Trailways, Inc. Joint Council, 807 F.2d 1416, 1425 (8th Cir. 1986)).

to determine if a prior arbitration award governed the conduct of parties to a collective bargaining agreement."[50] Lastly, the majority of other circuits have held that there is no preclusive effect "unless the collective bargaining agreement so stipulates."[51] Circuits holding this majority view also have said that without contractual language to the contrary, the preclusive effect of an earlier arbitration award is to be determined by the arbitrator.[52]

Courts that have used the "strict factual identity" test have required the facts to be so nearly identical that the employer's failure to adhere to the earlier arbitration awards constitutes willful and persistent disregard of the earlier awards.[53] While the Eighth Circuit's decision in *Trailways* that laid out the "strict identity test" appears to still be good law in that jurisdiction, the Eighth Circuit acknowledged approximately ten years after *Trailways* was decided that an arbitrator's award can be reversed because it does not draw its essence from the collective bargaining agreement, not only because it ignored a prior award.[54] The "material factual identity test" of the Fifth Circuit also appears to be good law and is met when there is no difference

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[50] *Id.* (citing Oil Workers Int'l Union, Local No. 4-16000 v. Ethyl Corp., 644 F.2d 1044, 1050 (5th Cir. 1981)).

[51] *Id.* at 555, 556 n.7

In *UAW Local Union No. 463 v. Weatherhead Co.*, the Sixth Circuit affirmed without comment a district court opinion that held "an arbitrator's decision on a question of interpretation of a collective bargaining agreement did not preclude rearbitration of that question, even though arbitration was contractually stipulated to be 'final and binding.'" *Dana Corp.*, 278 F.3d at 556 n.7 (citing UAW Local Union No. 463 v. Weatherhead Co., 316 F.2d 239 (6th Cir. 1963) (quotation omitted)). The district court noted that "the doctrines of res judicata and collateral estoppel *may* apply to an arbitrator's decision, [but] they are not applicable here." *Id.* (citing UAW Local Union No. 463 v. Weatherhead Co., 203 F.Supp. 612, 619 (N.D. Ohio 1962) (quotation marks omitted)). The *Dana* Court found the district court case of little import, particularly because it was decided before *Misco. Dana Corp.*, 278 F.3d at 555 n.7; *see supra* note 42 and accompanying text.

[52] Id. at 556, 556 n.8; *see, e.g.*, Bd. of Maint. of Way Employees v. Burlington N. R.R. Co., 24 F.3d 937, 940 (7th Cir. 1994); Hotel Ass'n of Washington D.C., Inc. v. Hotel & Rest. Employees Union, Local 25, 963 F.2d 388, 390 (D.C. Cir. 1992); Gen. Comm. of Adjustment, United Transp. Union v. CSX R.R. Corp., 893 F.2d 584, 593 n.10 (3rd Cir. 1990); Courier-Citizen Co. v. Boston Electrotypers Union No. 11, 702 F.2d 273, 280 (1st Cir. 1983); Conn. Light & Power Co. v. Local 420, Int'l Bd. of Elec. Workers, 718 F.2d 14, 20–21 (2nd Cir. 1983).

[53] United Elec. Radio and Mach. Workers of Am. v. Honeywell Inc., 522 F.2d 1221, 1227 (7th Cir. 1975).

[54] *Dana Corp.*, 278 F.3d at 555 n.6 (citing Am. Nat'l Can. Co. v. United Steelworkers, 120 F.3d 886, 891–92 (8th Cir. 1997)).

between the facts of the current and former disputes which would justify an arbitrator reaching a different conclusion in each of them based on the same collective bargaining agreement.[55] The Fifth Circuit distinguished material factual identity from strict factual identity by stating that "the term strict factual identity so completely defies being operationally defined as to be devoid of meaning."[56] Further, it noted that there can never be a truly strict factual identity,[57] but on the other hand, use of materiality can be logically and instrumentally defined.[58]

Dana relied on the Supreme Court case, *Metropolitan Edison v. NLRB*,[59] which stated the following in a footnote: "[w]here there is a clear and consistent pattern of arbitration decisions the parties, in some circumstances, may be said to have incorporated the decisions into their subsequent bargaining agreements."[60] Yet, Dana's reliance on *Metropolitan Edison* was misguided, because such an incorporation, if any, is up to the arbitrator to decide—not the court.[61]

The Sixth Circuit rejected the Fifth and Eighth Circuits' approaches and joined the majority of other circuits that have decided this issue by holding that "the preclusive effect of an earlier arbitration award is to be determined by the arbitrator."[62] Moreover, the Sixth Circuit also rejected Dana's argument that the Master Agreement's requirement of "final and binding" arbitration "mandates prospective application of standards developed in arbitration."[63] The Sixth Circuit relied on a D.C. Circuit opinion, where the appellant made the same argument as Dana.[64] According to the *Dana* Court, in *Hotel Ass'n of Washington D.C., Inc. v. Hotel Employees Union, Local 25*, the D.C. Circuit had held:

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[55] *Oil Workers Int'l Union*, 644 F.2d at 1055.

[56] *Id.* at 1054 (quotation marks omitted).

[57] *Id.*

[58] *Id.* at 1055.

[59] Metro. Edison Co. v. NLRB, 460 U.S. 693 (1983).

[60] *Id.* at 709 n.13.

[61] *Dana Corp.*, 278 F.3d at 556 (citing W.R. Grace & Co. v. Local Union 759, Int'l Union of Rubber Workers, 461 U.S. 757, 765 (1983)) (holding that "because the authority of arbitrators is a subject of collective bargaining, . . . the scope of the arbitrator's authority is itself a question of contract interpretation that the *parties have delegated to the arbitrator*") (emphasis added).

[62] *Id.* at 557.

[63] *Id.* at 555.

[64] Hotel Ass'n of Washington D.C., Inc. v. Hotel & Rest. Employees Union, 963 F.2d 388, 390 (D.C. Cir. 1992).

> [T]he "final and binding" clause of the collective bargaining agreement only required that an arbitrator not reopen an earlier arbitration decision; the clause "does not so unequivocally import the principle of precedent into arbitral decision making that [the arbitrator] was obliged expressly to consider it lest his decision fail to draw its essence from the contract."[65]

The Sixth Circuit expressed that arbitrators should consider prior arbitrations involving the same provisions of the collective bargaining agreements.[66] In contrast, other circuit courts have treated the prior arbitrations as irrelevant; in fact, they left the decision of precedential effect up to the arbitrator.[67] Consider the Second Circuit, which in *Connecticut Light & Power v. Local 420* stated that subsequent arbitrators usually treat prior awards as "final and binding," but if "awards are inconsistent and a 'need for resolving conflict is evident,' the federal court should 'select that interpretation which most clearly conforms to the intent of the parties.'"[68]

Arbitrator Glendon addressed Arbitrator Mittenthal's interpretation of the neutrality provision and only departed from it when a situation arose that Arbitrator Glendon found created an impossibility for reconciliation with Arbitrator Mittenthal's interpretation.[69] The court concluded that Arbitrator Glendon's award was a "reasonable construction" and "[drew] its essence from the Master Agreement."[70] In what seems like a recommendation to Dana, the Sixth Circuit noted the harsh language of the D.C. Circuit:

> [I]f the Employer is unhappy with the present [collective bargaining agreement] it can bargain over changing it—to make provision for a system of precedent, or to use a single arbitrator, or otherwise. It may not expect

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[65] *Dana Corp.*, 278 F.3d at 556 (citing *Hotel Ass'n*, 963 F.2d at 390). The Sixth Circuit also pointed to *UAW Local Union No. 463 v. Weatherhead Co.*, a case which held "that the 'final and binding' clause of the collective bargaining agreement made arbitration decisions 'final and binding' on the parties only in regards to that decision." *Id.* (citing UAW Local Union No. 463 v. Weatherhead Co., 203 F.Supp. 612, 619 (N.D. Ohio 1962)).

[66] *Id.* at 557.

[67] *Id.* at 556, 556 n.8 (citing all of the cases in note 52).

[68] *Dana Corp.*, 278 F.3d at 556 n.8 (citing Conn. Light & Power Co. v. Local 420, Int'l Bd. of Elec. Workers, 718 F.2d 14, 21 (2nd Cir. 1983)).

[69] *See id.* at 557; *supra* text accompanying notes 29–32.

[70] *Id.* at 557–58. Arbitrator Glendon's award did not meet any prong of the test for determining if an award fails to draw its essence from the collective bargaining agreement. *See id.*; *see also supra* text accompanying note 45.

this court, however, to serve as the deus ex machina that delivers it from the consequences of the present agreement.[71]

B. *Neutrality Agreements*

Dana also argued that Arbitrator Glendon's interpretation violated public policy, specifically federal labor policy.[72] The court began by pointing out that an arbitration award would only be overturned under the public policy exception in very limited circumstances.[73] To do so, "the court must determine whether the arbitrator's interpretation of the contract jeopardizes a well-defined and dominant public policy, taking the facts as found by the arbitrator."[74]

Dana correctly noted that Section 8(c) of the NLRA, 29 U.S.C. § 158(c), permits the expression of views by an employer during an organizational campaign, absent a threat of reprisal or promise of benefit, without such statement constituting evidence of an unfair labor practice.[75] Yet, Section 8(c) was irrelevant for the circumstances. First, neutrality arguments are enforceable by federal courts.[76] Second, federal labor policy promotes collective bargaining agreements, which cover the entire employment relationship, creating a "new common law—the common law of a particular industry or of a particular plant."[77] Both Dana and the UAW made an agreement governing *their employment relationship*, and an arbitrator

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[71] *Id.* at 557 (citing Hotel Ass'n, of Washington, D.C., Inc. v. Hotel Rest. Employees Union, Local 25 963 F.2d 388, 391(D.C. Cir. 1992)).

[72] *See supra* note 47 and accompanying text.

[73] *Dana Corp.*, 278 F.3d at 558 (citing E. Associated Coal Corp. v. UMW, District 17, 531 U.S. 57, 63 (2000)).

[74] *Id.* (citing MidMichigan Reg'l Med. Ctr.-Clare v. Prof'l Employees Div. of Local 79, 183 F.3d 497, 504 (6th Cir. 1999)).

[75] *Id.*

[76] *Id.* at 558–59 (citing AK Steel Corp. v. United Steelworkers, 163 F.3d 403, 406 (6th Cir. 1998); Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel, 996 F.2d 561, 563 (2d Cir. 1993); Hotel Employees Union Local 2 v. Marriott Corp., 961 F.2d 1464, 1470 (9th Cir. 1992); Charles I. Cohen, *Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?*, 16 LAB. LAW. 201, 204 (2000); George N. Davies, *Neutrality Agreements: Basic Principles of Enforcement and Available Remedies*, 16 LAB. LAW. 215, 216 (2000)).

[77] United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 579 (1960).

interpreted the neutrality provision in a linguistically permissible manner.[78] Dana *voluntarily* limited its own speech abilities, and hindsight taught it that that might have been a bad idea.[79] Nevertheless, a linguistically permissible interpretation of a contractual provision hardly violates a policy that encourages collectively bargained agreements.[80] Dana must heed the words of the D.C. Circuit.[81]

Lastly, Dana argued that it was the solemn protector of employees' rights by arguing that Arbitrator Glendon's interpretation "effect[ed] a waiver of its employees' statutorily protected rights to organize or refrain from organizing under [Section] 7 of the NLRA."[82] However, the court responded by noting that Section 7 rights are granted to employees, and it is unclear how a limitation on Dana affects these rights.[83] Also, the employees themselves must assert the claim, because a "prudential [requirement] of Article III standing is that 'a plaintiff . . . cannot rest his claim to relief on the legal rights or interests of third parties.'"[84]

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[78] *Dana Corp.*, 278 F.3d at 557–58.

[79] *Id.* at 558.

[80] *Warrior & Gulf Navigation Co.*, 363 U.S. at 581.

[81] *See supra* text accompanying note 71.

[82] *Dana Corp.*, 278 F.3d at 559 (citing 29 U.S.C. § 157).

[83] *Id.*

[84] *Id.* (citing Warth v. Seldin, 422 U.S. 490, 499 (1975)). There are exceptions to this rule and where the litigant and the third party's rights are "inextricably bound up" and the third party is not able to assert their rights, the Sixth Circuit has permitted the litigant to assert the third party's rights for them. *Id.* at 559 n.13 (citing Planned Parenthood Ass'n v. City of Cincinnati, 822 F.2d 1390, 1394 (6th Cir. 1987)). *But see* Viceroy Gold Corp. v. Aubry, 75 F.3d 482, 488–89 (9th Cir. 1996) (holding that an employer does not have standing to assert the rights of their employees because the employees could assert their rights themselves).

V. IS DANA CORP. THE RIGHT WAY?

The Sixth Circuit never explained why it rejected the strict or material factual identity tests—it merely adopted the majority approach.[85] The court did state, however, that the case before it would have likely failed either of those tests, because all of the arbitrations over the neutrality provision involved different conduct at different organizing campaigns.[86] Also, the court never explained why the majority approach is actually the better approach. However, the court never needed to.

In *Major League Baseball Players Ass'n v. Garvey*, the United States Supreme Court recently demonstrated how narrow the class of cases is which will permit a judicial overturning of an arbitration decision when it would not even permit serious error on the part of the arbitrator to be a sufficient reason to reverse the arbitrator's decision.[87] Even *serious error* is not enough if the arbitrator "arguably construe[es] or appl[ies] the contract and act[s] within the scope of his authority."[88] Thus, *Dana* and other cases which are concerned with the precedential effect of prior arbitrations are really about the power of an arbitrator—specifically, the power of a labor arbitrator. In *Misco*, the Supreme Court stated that an arbitration award must draw its *essence* from the collective bargaining agreement.[89] The Supreme Court did not say that the award must draw its *essence* from the bargaining history or history of grievances; therefore, why should we be inclined to read such language into *Misco* or *Garvey*?

A collective bargaining agreement is a contract,[90] as was the Neutrality Letter. As such, both Dana and the UAW bound themselves to the very words, which derived from their collective bargaining. Arbitrator Glendon examined the events surrounding the grievances and applied them to the contracts governing Dana and the UAW's employment relationship.[91] The

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[85] *Dana Corp.*, 278 F.3d at 557.

[86] *Id.* at 557 n.9.

[87] Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001); *see also supra* text accompanying note 43.

[88] *Id.*

[89] United Paperworkers Int'l Union v. Misco, 484 U.S. 29, 36 (1987)

[90] United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578–79 (1960) (citing Dean Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1004–05 (1955)).

[91] *Dana Corp.*, 278 F.3d at 550–54.

Supreme Court "exalted the role of the arbitrator as a force for industrial peace, articulat[ing] a view of the labor contract as a working arrangement between labor and management engrossing unwritten understandings and plant practices . . . and announced a doctrine of judicial self-restraint."[92] Apparently, much to Dana's chagrin, the Sixth Circuit maintains the doctrine of judicial self–restraint and *Misco* still governs the standard for reviewing arbitrations.

VI. CONCLUSION

Stare decisis, res judicata, and collateral estoppel all serve important functions with respect to judicial economy.[93] Yet, the United States Supreme Court has granted much more freedom to arbitrators in fashioning the awards they may give. Arbitrators in labor arbitrations have the collective bargaining agreement—a custom made private law, essentially a private constitution for resolving grievances.[94] Parties must decide in advance how the arbitrator's decisions will be limited and whether doctrines such as res judicata and stare decisis should apply, because the arbitrator is only as powerful as the parties permit her to be.

Jared S. Gross

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[92] ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW 551 (1976).

[93] *See supra* text accompanying note 1.

[94] *Warrior & Gulf Navigation Co.*, 363 U.S. at 581.